1992

State of Utah v. Lonnie Kirkland Masciantonio : Reply Brief

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Attorney for Appellee.
Gary W. Pendleton; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff and Appellee,	)	
vs.	)	
LONNIE KIRKLAND MASCIANTONIO,	)	Case No. 920466-CA
Defendant and Appellant.	)	

REPLY BRIEF

APPEAL FROM CONVICTION OF FORGERY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-6-501 (1991) IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE JAMES L. SHUMATE PRESIDING

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REPLY BRIEF

SUMMARY OF ARGUMENT

The fact that the Utah forgery statute includes bank checks in the second degree felony classification does not require a different construction or interpretation of the other language in the statute. Furthermore, even if the general terms of subsection (3)(b) have taken on a broader scope, the document here in question still falls outside the second degree felony classification.

ARGUMENT

POINT I

UTAH'S INCLUSION OF BANK CHECKS IN THE SECOND DEGREE FELONY CLASSIFICATION DOES NOT ALTER THE CONSTRUCTION OR INTERPRETATION OF OTHER STATUTORY LANGUAGE.

The State suggests that U.C.A. 76-6-501(3)(b) includes three specific items all of which add color and meaning to the phrase "any other instrument or writing representing

an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise."

The State argues:

> Subsection (3)(b) specifically enumerates 3 types of instruments: a check for $100 or more, an issue of stocks, and an issue of bonds. Defendant's argument ignores the significance of the legislature's intentional inclusion of a check and focuses only on the stocks and bonds language.

Appellee's Brief at 8.

In this argument, the State overlooks the fact that "any other instrument or writing" is part of a prepositional phrase which acts as an adjective modifying the noun, "an issue." It has no reference to "[a] check in the face amount of $100 or more."[1]

As pointed out in Appellant's opening brief, U.C.A. 76-6-501(3) is comparable to the first sentence of Model Penal Code §224.1(2). Appellant's Brief at 9. If the Utah statute had not departed from the format of the Model Code by including a reference to "[a] check with a face amount of $100 or more," there would be little question that the holdings in People v. Korsen 117 Misc. 2d 875, 459 N.Y.S. 2d 380 (1983), and State v. Reed, 183 N.J. Super. 184, 443 A.2d 744 (1982), would resolve the issue here presented.

In substance, the issue which the State raises is: What effect does the inclusion of bank checks have on the construction and interpretation of the language of

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[1]By way of comparison, note the parallels existing between the language of subsection (3)(b) and the provisions of the Utah Uniform Commercial Code defining investment securities (i.e. stocks and bonds).

> U.C.A. 76-6-501(3)(b):
> ". . . any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise."
> U.C.A. 70A-8-102(1):
> ". . . a share, participation, or other interest in property of or an enterprise of the issuer, or an obligation of the issuer which is represented by an instrument . . . ."

subsection (3)(b) as a whole?

The State would have this Court believe that by including bank checks the Legislature intended to abandon any circumscription found in the Model Code's definition of second degree felony forgery. On the other hand, Defendant contends that the Legislature intended to include but one additional category of instruments in the second degree felony classification.

The drafters of the Model Penal Code were careful to limit the second degree felony classification to the forgery of documents which would facilitate the perpetration of fraud on a large scale and the forgery of "widely circulating instruments representing wealth." See Model Penal Code §224.1 comment 8. It seems highly unlikely that the Legislature intended to abandon that circumscription by the mere addition of bank checks to the second degree felony classification.

POINT II

EVEN IF THE SCOPE OF THE GENERAL TERM OF THE UTAH STATUTE HAS BEEN ALTERED, IT HAS NOT BEEN SO EXPANDED AS TO INCLUDE THE DOCUMENT HERE IN QUESTION.

Defendant concedes that the New York and New Jersey statutes which are construed in Korsen and Reed do not include any reference to bank checks. In the event this Court concludes that the Utah Legislature intended the reference to bank checks to expand the scope of the general reference ("any other instrument or writing"), Korsen and Reed are arguably distinguishable.

Like Utah, New Hampshire has included the forgery of bank checks, stock

certificates and bonds within the same grade of offense. Under Section 638:1, III(b), Revised Statutes of New Hampshire, Annotated, 1955, forgery is a class B felony if the subject writing is or purports to be: "a check, an issue of stocks, bonds, or any other instrument representing an interest in or claim against property, or a pecuniary interest or claim against any person or enterprise."

The State cites and relies on State v. Allegra, 129 N.H. 720, 533 A.2d 338 (1987), contending that the case stands for the proposition that the general reference to "any other instrument" in the New Hampshire statute takes color from the specific reference to bank checks as well as the reference to issues of stocks and bonds. Appellee's Brief at 8-9.

In Allegra, the electric company advised the defendant by letter dated December 7, 1983, that the power service to an electrical sign at the defendant's place of business would be disconnected as the result of storm damage which the sign had sustained. On December 8, the defendant arranged insurance coverage for the sign under an existing policy. He did not disclose the fact that the sign had already been damaged. The following January he filed a claim under the insurance policy for the loss associated with the storm damage to the sign, supporting the claim with a copy of the December 7 letter from the electric company. The letter had been altered to indicate that it had been authored on December 19, 1983.

In an opinion by Justice Souter, then of the New Hampshire Supreme Court, the unanimous court concluded:

> Before us, the defendant stands his ground in maintaining that the indictment charged only a misdemeanor, and the State has taken the position that it charged a felony. The defendant is correct.

. . .

> The forgery indictment in this case charged that the defendant "did purposely alter the writing of the Public Service Company . . . by changing the date on a disconnect notice [i.e., letter] sent to Joseph Allegra . . . ." The indictment included the notation, "Class B Felony."
>
> The notation was clearly wrong. The letter or "disconnect notice" is not one of the documents specifically listed in RSA 638:1, III(a) and (b). Nor does it fall within the latter subparagraph's general category of "any other instrument representing an interest in or claim against property, or a pecuniary interest or claim against any person or enterprise." RSA 638:1, III(b). The document was a letter informing the defendant that the company had turned off the power to an advertising sign damaged by wind. It created no property interest and independently predicated no claim of title or entitlement in the manner of a check, a stock certificate or a bond. While the State points out that the defendant employed the letter to support his claim for insurance reimbursement, this position fails to recognize the distinction between the nature of the document and the nature of the defendant's independent use of that document. [Emphasis added.]

Id. at 341-342.

Note that in determining the scope of instruments falling within the felony classification, the New Hampshire court spoke in terms of instruments which create or purport to create property interests or upon which a claim of title or entitlement can be "independently predicated." Id. at 342. The New Hampshire opinion suggests that the B felony forgery classification is applied only to those documents which appear to have intrinsic value such as bank checks, stock certificates and bonds. The court was unwilling to classify the forgery of a document without intrinsic value as a felony regardless of the fact that the document had been used in furthering a fraudulent scheme.

Even if this Court concludes that the inclusion of any bank check in the second degree felony classification should be construed to expand the general reference to other

instruments and writings, it does not follow that the instrument here in question falls within the second degree felony classification. All of the specific references in Subsection (3)(b) still relate to instruments which by their very nature purportedly possess intrinsic value.

In the instant case, the State attempts to devise a scenario under which the Radio Shack receipt would have possessed some intrinsic value. In so doing, the State alleges:

> In the normal course of business, a customer's signature on a properly drafted invoice for returned merchandise represents a claim against Radio Shack for the purchase price of the merchandise which has been returned. When the signed invoice is returned to the store employee, the purchase price is given to the customer in satisfaction of the claim or, if store funds are insufficient, the customer is sent to another location where, upon presentation, the invoice is paid (Prelim. at 6, 22-23). Consequently, an invoice for the return of merchandise represents, however briefly, a customer's pecuniary claim against the business.[2]

Appellee's Brief at 9.

The State's argument cleverly suggests that the receipt represents the embodiment of an obligation which must be paid upon presentment of the document and that the document therefore has intrinsic value.

Black's Law Dictionary, Fifth Edition, defines "receipt" as follows:

> Written acknowledgment of the receipt of money, or a thing of value, without containing any affirmative obligation upon either party to it; a mere admission of a fact, in writing. And, being a mere acknowledgment of payment, is subject to parole explanation or contradiction.

A receipt is never the embodiment of an outstanding claim, it is evidence that

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[2]Note that there is nothing in the record which indicates that Radio Shack customers were required to sign any invoice acknowledging receipt of funds prior to actually receiving the cash refund.

a claim has been extinguished. A receipt cannot be presented by way of demand. While a fictitious receipt may be used in connection with the orchestration of a fraud, a property interest is not evidenced thereby nor can a claim of title or entitlement be "independently predicated" thereon.

By contrast, a person who acquires a bank check, a stock certificate or a bond acquires an instrument which embodies a claim or entitlement that can be asserted against another, whether it be the bank upon which the check is drawn, the corporation which issued the stock certificate, or the person or entity which executed the bond.

CONCLUSION

It is respectfully submitted that the receipt in question does not fall within the second degree felony classification and, therefore, the judgment of conviction should be reversed and the case remanded to the district court with instruments to reduce Defendant's conviction from a second degree felony to the class A misdemeanor.

DATED this 26 day of October, 1992.

/s/
Gary W. Pendleton
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

This is to certify that I caused four true and exact copies of the within and foregoing document to be mailed to the Utah Attorney General, R. Paul Van Dam and

Assistant Attorney General, Kris Leonard, at 236 State Capitol Building, Salt Lake City, Utah 84114, on the 26 day of October, 1992.

/S/
Gary W. Pendleton
Attorney for Defendant/Appellant